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No. 97-1989

In The

Supreme Court of the United States

October Term, 1997

ANDRZEJ KUHL, STEPHEN SCHLESINGER, BARBARA SCHLESINGER, MARY ALLEN, ROBERT C. HOLMES, THOMAS KELLY, PATTERSON SMITH, ALICE F. FREED, PATRICK FINNEGAN, CULLEN MCVOY AND ELIZABETH MCVOY,

Petitioners,

v.

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONTCLAIR AND B'NAI KESHET MONTCLAIR JEWISH CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the equal application of state zoning requirements to religious and secular uses violate the Establishment Clause?

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STATEMENT OF THE CASE

This matter arises out of a zoning application made to the Zoning Board of Adjustment of Montclair, New Jersey ("Board") by a religious congregation, B'Nai Keshet Montclair Jewish Center ("Applicant"). After a lengthy hearing process, the Board approved the application. That approval was affirmed in turn by the Law Division of the Superior Court of New Jersey and the Appellate Division of the Superior Court, and, thereafter, a final appeal was dismissed by the Supreme Court of New Jersey. In each instance, the reviewing court found absolutely no basis for the plaintiffs' contention that the grant of the sought after zoning variances and other approvals violated the Establishment Clause. Instead, the courts correctly concluded that the only substantive issues were governed by New Jersey zoning law. The relevant facts are as follows.[1]

On November 23, 1993, Respondent B'Nai Keshet Montclair Jewish Center ("Applicant") applied to the Board for a use variance pursuant to *N.J.S.A.* 40:55D-70(d) to convert and expand an existing building for use as a house of worship, a religious school and for related activities. Applicant is a non-profit New Jersey corporation organized and devoted to religious and educational purposes, established over fifteen years ago by a group of Montclair residents. Seventy-five percent of the Applicant's members are Montclair residents. The property

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[1] In the interest of brevity, only the most pertinent facts will be set forth. For a complete account of the facts of this case, the Respondents respectfully refer the Court to the statement of facts set forth in the original trial court opinion at pages 17a-25a of the Petition for Certiorari.

which is the subject of the application is located in an R-I Zone, in which zone a house of worship is not a permitted use. In the immediate area surrounding the specific property there are a variety of multi-family and non-residential uses, including several houses of worship. After a total of twenty-six hearings stretching over a fifteen month period from April 20, 1994 to July 19, 1995, the Board granted the necessary variances and approved the required site plan in separate resolutions. During the hearings, extensive testimony was presented for both sides by planners, traffic experts, architects, real estate experts and members of the general public.

In granting the variances, the Board found the proposed house of worship to belong to the class of "inherently beneficial uses", a class which is subject to special requirements with respect to the granting of variances under established New Jersey zoning law. Consistent with that classification, the Board applied the appropriate four-part test established for inherently beneficial uses by the Supreme Court of New Jersey in *Sica v. Bd. of Adj. of Township of Wall*, 127 N.J. 152 (1992). The application of the *Sica* test resulted in the approval of the use variance. The finding that the use was "inherently beneficial" was supported by the testimony of the Petitioners' own experts.

Petitioners appealed the Board's actions to the Superior Court of New Jersey, Law Division, Essex County. After receiving briefs and hearing oral argument, Honorable Alvin Weiss, J.S.C., rendered a thirty-six page opinion in which he dismissed all challenges to the actions of the Board. (Pet. for Cert. Appendix C.) Judgment was entered in favor of the Applicant and the Board on April 23, 1996.

Petitioners then filed a Notice to Appeal to the Appellate Division of the Superior Court dated May 31, 1996. The appeal was heard by a three judge panel on October 29, 1997 and two weeks later the Court affirmed the trial court in a *per curiam* opinion dated November 14, 1997. (Pet. for Cert. Appendix D.) Petitioners appealed to the New Jersey Supreme Court solely on constitutional grounds, and on March 11, 1998, that Court dismissed Petitioners' appeal for failure to raise a substantial constitutional question. (Pet. for Cert. Appendix E.)

ARGUMENT

THE CONSTITUTIONAL QUESTIONS RAISED BY THE PETITIONERS HAVE ALREADY BEEN CONCLUSIVELY DECIDED BY THIS AND OTHER COURTS, OR IN THE ALTERNATIVE, ARE FRIVOLOUS AND NOT OF A SUBSTANTIAL NATURE.

Petitioners' arguments are nothing more than a shallow attempt to transform a conventional zoning case, governed by New Jersey zoning law, into a constitutional controversy. Petitioners raise two supposed constitutional issues:

1) The state violates the Establishment Clause and advances religion in general when it places houses of worship in the category of "inherently beneficial uses".

2) The statement by the Montclair Board in its resolution that the "proposed use . . . contributes to Montclair's goal to continue as a diverse community" advances religion by preferring one religious group over

another in violation of the Establishment Clause.

A. Acknowledging religious uses to be inherently beneficial does not constitute the establishment of religion.

Identifying the general welfare benefits of religious uses and according such uses the same benefits as are granted other inherently beneficial uses in no way violates the United States Constitution. The New Jersey "inherently beneficial use" doctrine, as applied in zoning cases, relates to both secular and religious uses. It has been applied to hospitals, assisted living facilities, day care centers, telephone towers and houses of worship. It makes no difference whether the use is not-for-profit or proprietary. So long as the use furthers the general welfare, it qualifies to be "inherently beneficial".

The contention that houses of worship should not be treated as inherently beneficial is without merit. There is a direct benefit to the general welfare from such facilities. The benefit from the religious use may be educational or social. It may involve the performance of acts of charity aiding those in need. It may be responsive to the spiritual needs of its members. In any and all of these ways, it contributes to the promotion of morals and the improvement of the general welfare of the community. That the benefit may emanate from a religious organization does not detract from the inherently beneficial aspects of the use. While religious uses are not to receive preferential treatment, by the same token, they should not be the target for discriminatory treatment.

New Jersey courts have addressed the issue on several occasions and each time have found "houses of worship" to be inherently beneficial. In *Kali Bari Temple v. Readington Township Bd. of Adj.*, 271 N.J. Super. 241, 248 (App. Div. 1994), the Appellate Division specifically found church uses to be "inherently beneficial" and "clearly in furtherance of the public morals and general welfare." *See also Sugarman v. Teaneck Township*, 272 N.J. Super. 162, 172 (App. Div. 1994), *cert. denied*, 137 N.J. 310 (1994); *State v. Cameron*, 184 N.J. Super. 66, 75 (Law Div. 1982), *aff'd*, 189 N.J. Super. 404 (App. Div. 1983), *rev'd on other grounds*, 100 N.J. 586 (1985). None of the above cases raises even the slightest doubt as to the constitutionality of the classification of a religious use as inherently beneficial.

The First Amendment prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The standard for determining the application of the Establishment Clause is this Court's three-pronged test pronounced in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Under this test, a court must determine (1) whether the challenged law or conduct has a secular purpose; (2) whether its principal or primary effect is to advance or inhibit religion; and (3) whether it extensively entangles government with religion. *See id.*

Applying this test, it is clear that New Jersey's zoning statutes and ordinances and related judicial interpretations demonstrably fall short of conflicting with the Establishment Clause. *N.J.S.A.* 40:55D-70(d), the New Jersey statute controlling the grant of use variances, has a secular purpose, that is, the furtherance of public morals

and general welfare. That, in and of itself, does not evidence a non-secular purpose. Furthermore, the statute's primary effect does not advance religion. The determination that a religious use is inherently beneficial in no way establishes or unconstitutionally favors the religious users. The *Lemon* test asks whether the **primary** effect is to advance religion. That is simply not the result of the application of the "inherently beneficial" concept to religious uses. In this case, there is no treatment afforded the Applicant that would not similarly and typically have been granted other inherently beneficial users.

This Court's decision in *Walz v. Tax Comm'r of New York*, 397 U.S. 664 (1970) requires denial of Petitioners' constitutional claim. In *Walz*, this Court rejected an Establishment Clause challenge to the very common real estate tax exemption for church property. That exemption was part of a general exemption for charitable, educational, and similar, socially valuable activities. Here too, as the courts below have noted, the zoning benefits of the "inherently beneficial use" doctrine apply to a broad range of activities deemed to promote the general welfare, including schools, senior citizen housing, and hospitals. *See Andrews v. Ocean Township Bd. of Adj.*, 30 N.J. 245 (1959); *Jayber, Inc. v. Municipal Council*, 238 N.J. Super. 165 (App. Div. 1990), *cert. den.*, 122 N.J. 142 (1990).

Contrary to what the Petitioners contend, religious uses are not given preferential treatment over similarly situated, socially valuable, secular uses, and, thus, no constitutional problem exists. *See Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (holding that a State-affiliated university did not violate the Establishment

Clause by assisting and funding campus religious organization in the same manner as similar non-religious organizations); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding parental tax credit for tuition to nonpublic schools, because the credit was equally applicable to secular and religious private schools); and *Texas Monthly v. Bullock*, 489 U.S. 1, 10-11 (1989) (distinguishing *Walz* and *Mueller* in striking down a sales tax exemption applicable ***solely*** to religious publications).

Worthy of note is this Court's statement in *Walz*, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Therefore, just as Justice Brennan distinguished tax exemptions from subsidies in his concurrence, this Court should distinguish the accommodation of religious uses from the favoritism forbidden by the Establishment Clause. *See id.* at 689-90 (Brennan, J., concurring).

This Court's decisions in *Walz*, and other Establishment Clause cases, demonstrate that Petitioners' constitutional claims have no merit. The characterization of religious uses as "inherently beneficial uses" does not conflict with the Establishment Clause. Indeed, Justice Brennan, in his concurrence to *Walz*, appeared to acknowledge the principle that religious uses are "inherently beneficial," when he said:

> "During their ordinary operations, most churches engage in activities of a secular nature that benefit the community; and all churches by their existence contribute to the diversity of

> association, viewpoint, and enterprise so highly valued by all of us." *Id.* at 692-93.

B. By noting that the proposed use contributes to Montclair's goal to continue as a "diverse community", the local zoning board did not prefer one religion over another.

Petitioner's second supposed constitutional issue is even more frivolous than its first. Simply by recognizing the Applicant's potential to contribute to the diversity of the community, in no way did the Board advance a particular religion or prefer one religious group over another. Petitioners have taken the Board's statement entirely out of context and misconstrued it.

The Board's full finding was:

> 4. The proposed house of worship also promotes the purposes of zoning set forth in N.J.S.A. 40:55D-2. The public interest at stake is manifest, free exercise of religion and freedom of worship were recognized by the framers of the Constitution as inalienable rights. The proposed use is clearly in furtherance of the general welfare and contributes to Montclair's goal to continue as a diverse community.

(Pet. For Cert. Appendix A, p. 2a.) Having noted that one of the purposes of zoning as set forth in New Jersey's Municipal Land Use Law is promotion of "morals" and "general welfare", the Board was simply recognizing that religious uses promote morals and the general welfare.

The last statement as to Montclair's "goal to continue as a diverse community" should be welcomed, not criticized. Diverse communities are not exclusive. They welcome and accept different groups. In this case the reference is to different religious groups. A new Presbyterian, Episcopalian, or Catholic church would, for example, also contribute to the town's goal to continue as a diverse community, even though some churches of such denominations may already exist in town. This is necessarily true because each religious group is different in membership, interests, emphasis, and leadership, if not in ritual and belief.

The record does not reflect any favoritism on the part of the Board, nor does it indicate any semblance of an alleged "diversity test" that Petitioners claim must be passed by applicants for a variance. A correct interpretation and reading of the Board's statement is that it is simply an endorsement of religious uses as "inherently beneficial." The reference to "diverse community" in the last sentence of paragraph 4 is nothing more than a passing comment on the community's perceptions of and aspirations for itself. (See Justice Brennan's comment in *Walz* quoted above as to churches contributing "to the diversity of association, viewpoint and enterprise so highly valued by all of us.")

Underlying Petitioners' position, is the premise that government may not accommodate religion or recognize the variety of our religious constitutions. This premise is false.

> "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance

> of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

As further stated by the majority in *Lynch*, ours is a society "whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas." *Id.* at p. 678. The local Montclair zoning board was simply restating these principles in its approval of a new house of worship for the municipality.

CONCLUSION

For all the aforementioned reasons, it is respectfully submitted that Petitioners have failed to raise any substantial constitutional question, and Petitioners' writ of certiorari should be denied.

Respectfully submitted,

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